

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VILLAGE AT KNAPP'S CROSSING, LLC,

Plaintiff/Counter-Defendant/Cross-  
Defendant-Appellant,

v

FAMILY FARE, LLC,

Defendant/Counter-Plaintiff/Third-  
Party Plaintiff/Cross-Defendant-  
Appellee,

and

LAMAR CONSTRUCTION COMPANY,

Third-Party Defendant/Cross-  
Defendant/Cross-Plaintiff-Appellee,

and

BDG ACQUISITION, LLC, KERRI MANLEY  
BENNETT, and DANIEL SCHAAFSMA,

Third-Party Defendants/Cross-  
Plaintiffs/Cross-Defendants-  
Appellees,

and

STEVEN D. BENNER,

Third-Party Defendant.

UNPUBLISHED  
February 18, 2014

No. 313154  
Kent Circuit Court  
LC No. 11-004168-CK

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Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiff/counter-defendant/cross-defendant Village At Knapp's Crossing, LLC, (plaintiff), appeals as of right an August 17, 2012, trial court order granting defendant/counter-plaintiff/third-party plaintiff/cross-defendant Family Fare, LLC's (Family Fare's), motion to dismiss this case with prejudice as a sanction for discovery violations. For the reasons set forth in this opinion, we affirm.

On May 6, 2011, plaintiff sued Family Fare alleging breach of contract arising from a land purchase linked to a development project. On June 3, 2011, Family Fare served plaintiff with a discovery request for written interrogatories and requests to produce documents. Family Fare then filed a counterclaim and parties were added to the case.

On February 24, 2012, the trial court entered a scheduling order, requiring all responses to prior discovery requests be completed by March 1, 2012. Thereafter, counsels for plaintiff and Family Fare exchanged communications regarding plaintiff's response to Family Fare's discovery request. Family Fare complained of plaintiff's failure to produce documents and took issue with plaintiff's vague response to most of the interrogatories.

On May 11, 2012, Family Fare moved the trial court for dismissal or to compel discovery, arguing that plaintiff failed to provide "full and complete response to interrogatories and production of documents." At a June 12, 2012, hearing, the trial court indicated that it read the initial responses to the interrogatories and found that plaintiff's responses were "wholly, completely, utterly inadequate; just totally deficient in what was required." The court ordered plaintiff to fully supplement the responses to the interrogatories and provide Family Fare with "all requested documents" by June 15, 2012, or it would dismiss the case with prejudice.

Thereafter, plaintiff produced additional documents and supplemented its answers to the interrogatories. However, Family Fare again moved the trial court for dismissal,<sup>1</sup> alleging that plaintiff failed to produce financial documents related to the development project, which were critical to plaintiff's claim that it suffered damages (i.e. Family Fare's breach of contract delayed the project resulting in losses). In particular, Family Fare argued that plaintiff failed to produce "communications and financing/loan documents" that plaintiff submitted to lenders. As proof, Family Fare attached emails that plaintiff produced; the emails were from Steven Benner, the principal owner of plaintiff, to potential lenders. The emails had financial documents attached. Family Fare claimed that, although plaintiff produced the emails, it failed to produce the attachments. Family Fare also argued that plaintiff failed to produce other communications.

Plaintiff responded, arguing that it produced thousands of pages of documents and made efforts to comply with the discovery order.

Following a hearing, the trial court granted Family Fare's motion and dismissed the case with prejudice. The court found that plaintiff failed to produce critical information attached to the emails including cash-flow analysis and income projections. The court reasoned that dismissal was appropriate where plaintiff repeatedly failed to comply with its discovery orders.

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<sup>1</sup> Other than Steven Benner, all of the parties joined in Family Fare's motion.

Plaintiff contends that the trial court abused its discretion in dismissing this case as a sanction for a discovery violation. We review a trial court's order imposing discovery sanctions for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Factual findings underlying a decision to impose sanctions are reviewed for clear error. *Woodington v Shokoohi*, 288 Mich App 352, 358; 792 NW2d 63 (2010).

A trial court has discretion to sanction a party for violation of a discovery order pursuant to MCR 2.313(B), which provides in relevant part as follows:

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

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(c) an order . . . dismissing the action or proceeding or a part of it. . . .

"Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Dismissal is proper "only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary." *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 397; 484 NW2d 718 (1992).

Having reviewed the record, we conclude that the trial court's dismissal did not fall outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12. Here, Family Fare submitted its request for discovery on June 3, 2011, wherein Family Fare expressly asked plaintiff to produce financial documents related to the project. Plaintiff had until March 1, 2012, to respond to the request, yet it failed to do so. In its initial production, plaintiff's responses to the interrogatories was, as the court described it, "woefully inadequate," and plaintiff did not produce any documents at that time. Only after Family Fare made repeated written requests and after entering into a stipulation, plaintiff finally produced documents and supplemented its responses to the interrogatories. However, even this attempt to correct the deficiencies was inadequate. Plaintiff only revised two of its responses to the interrogatories and it submitted about 11,000 pages of documents, the lowest amount among all of the parties. By May 1, 2012, when Family Fare moved for sanctions, plaintiff had been in possession of the discovery request for nearly a year and had failed to adequately respond. At best, plaintiff's efforts showed a disregard for the trial court's March 1, 2012 deadline and at worst, showed evidence of deliberate attempts to frustrate the discovery process. The trial court provided plaintiff ample opportunities to honor the discovery requests.

Plaintiff's non-compliance continued even after the June 12, 2012, trial court order. Plaintiff produced a link to additional documents by the June 15, 2012, deadline, but the link did

not work and Family Fare could not access the documents until June 18, 2012, three days later. Even then, Family Fare identified crucial financial documents that were missing. In particular, plaintiff failed to produce items including a cost schedule, income projections, federal forms, a cash-flow document and other documentation that Benner attached to emails he sent to potential lenders. In total, Family Fare listed 39 different attachments that were not produced even though it initially requested financial documents months earlier. It is not reasonable to conclude that plaintiff did not know that these attachments needed to be disclosed given the nature of plaintiff's claims and considering the scope of Family Fare's discovery request. Furthermore, evidence that emails were missing from the main company account and proof that attachments were not recoverable supported the trial court's suspicion that plaintiff intentionally hid documents and frustrated the discovery process. Finally, although plaintiff's counsel attempted to remedy the situation by promising to produce missing documents, at that point, plaintiff already had months to remedy the discovery issues yet failed to do so. It was reasonable for the trial court to conclude that plaintiff was not going to remedy the problem.

In short, plaintiff had a significant amount of time to respond to the discovery request, and nearly a year later, had failed to adequately do so. Plaintiff failed to comply with the initial discovery order and it did not fully comply with the subsequent order. The trial court gave plaintiff numerous opportunities to comply with the discovery requests. Even after these opportunities were given to plaintiff, the trial court sought less harsh remedies for plaintiff's noncompliance. In advance of dismissal, the trial court warned plaintiff on numerous occasions of its noncompliance. The trial court even gave plaintiff a date certain by which plaintiff was to have delivered the documents or face dismissal. It was only when it became apparent to the trial court that plaintiff was not going to comply that the trial court imposed the sanction of dismissal. Given the nature of the claims and the scope of the discovery request, it is not plausible for plaintiff to claim that it did not know that the email attachments needed to be disclosed. Rather, plaintiff's failures showed a repeated disregard of the trial court's orders and a flagrant and wanton refusal to facilitate discovery. *Frankenmuth Mut Ins Co*, 193 Mich App at 397.

Affirmed. No costs awarded. MCR 7.219(A).

/s/ David H. Sawyer  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering